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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

PETER BLAKE,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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COUNSEL OF RECORD

January 8, 1992

QUESTIONS PRESENTED

1. Did the Court of Appeals misconstrue Fed.R.Evid. 608 (b) by holding that it was permissibile to impeach the Petitioner with an extraneous drug transaction where the Government had engineered a denial of drug activity from Petitioner on cross-examination?

2. Did the Court of Appeals err in affirming the conviction on the alternate ground that the extraneous offense evidence was admissible under Fed.R.Evid. 404(b) where the trial court did not make fact findings sufficient to allow review on the issue that this evidence was substantively admissible?

3. Did the Court of Appeals err in holding that cross-examination suggesting that Petitioner had killed ten people in Jamaica was harmless error?

LIST OF PARTIES

Peter Blake, a/k/a David Clark and Winston Wilson, Appellant below and Petitioner herein.

The United States of America, Appellee below and Respondent herein.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PETER BLAKE,

PETITIONER

VS.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Peter Blake, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 28, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit appears at 941 F.2d 334. A copy of that opinion appears in the Appendix. A motion for rehearing was timely filed and overruled on October 10, 1991. A copy of that order also appears in the Appendix; however no written opinion was issued on rehearing.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered an opinion affirming Petitioner's conviction on August 28, 1991. Petitioner received an extension of time to file his petition for panel rehearing and thereafter timely filed his petition. The Court of Appeals overruled the petition for panel rehearing by written order dated October 10, 1991. Therefore, the petition for writ of certiorari was timely filed on or before January 8, 1992.

Petitioner was convicted in the United States District Court, Northern District of Texas, for various weapons and narcotics offenses. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1) and SUP.CT.R. 13.1.

RULES INVOLVED

Fed.R.Evid. 608(b) provides as follows:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> "The giving of testimony, whether by an accused or by any other witness, does not

operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

Rule 404(b) provides as follows:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Fed.R.Evid. 403(a) provides as follows:

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

STATEMENT OF THE CASE

In Cause No. CR3-90-0095-H Petitioner Peter Blake was charged with use of false identification in acquisition of a firearm in violation of 18 U.S.C. Sec. 922(a)(6) and Sec. 924(a)(1) (Count One); possession of firearms by an illegal alien in violation of 18 U.S.C. Sec. 922(g)(5) and Sec. 924(a)(2) (Counts Two and Seven); possession of cocaine with intent to distribute in violation of 21 U.S.C. Sec. 841(a)(1) (Count Three); unlawfully receiving and possessing an unregistered firearm in violation of 26 U.S.C. Sec. 5861(b) and Sec. 5871 (Count Four); and use of a firearm in a drug trafficking crime in violation of 18 U.S.C. Sec. 924(a)(1) (Counts Five and Six). (R.I-8-12).

After a jury found Petitioner guilty on all counts, the trial court, pursuant to the United States Sentencing Guidelines, sentenced Petitioner to one hundred eighty-eight (188) months confinement pursuant to Counts One through Four and Seven of the indictment; thirty (30) years on Count Five; and five (5) years on Count Six. By statute, the sentences on Counts Five and Six were ordered to run consecutively to the sentence imposed in Counts One through Four and Seven. The total sentence assessed was fifty (50) years and eight (8) months. (R.I-147).

Viewed in the light most favorable to the verdict, the evidence at trial established that Petitioner was arrested on April 12, 1990, after a police chase. Petitioner had been under surveillance based upon an arrest warrant for a firearms purchase Petitioner had made under the alias Winston Wilson. According to agents for the Bureau of Alcohol, Tobacco, and Firearms, Petitioner spoke to them after his arrest and gave them consent to search a particular apartment. Inside that apartment, officers found a submachine gun and a large quantity of cocaine. This discovery led to several charges in the indictment.

Evidence was also introduced showing that Petitioner had made two firearms purchases in March, 1989, by using the alias Winston Wilson.

Petitioner testified in his own behalf. On cross-examination, the Government engineered Petitioner's denial that he had ever been involved in drug activity. The Government later produced extrinsic evidence establishing that petitioner was an alleged participant in an earlier narcotics sale. The Government also asked Petitioner if he had killed ten people in Jamaica. These incidents in Petitioner's trial give rise to this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I.

THE FIFTH CIRCUIT COURT OF APPEALS HAS MISCONSTRUED FED.R.EVID. 608(b) TO OVERRULE AN IMPORTANT PRINCIPLE OF EVIDENTIARY LAW HOLDING THAT WHERE A DEFENDANT IS CROSS-EXAMINED FOR THE PURPOSE OF IMPEACHING HIS CREDIBILITY BY PROOF OF SPECIFIC ACTS OF PAST MISCONDUCT NOT THE SUBJECT OF CONVICTION, THE EXAMINER MUST BE CONTENT WITH THE WITNESS'S ANSWER AND MAY NOT, OVER OBJECTION, PRODUCE INDEPENDENT PROOF TO SHOW THE FALSITY OF THE ANSWER.

II.

THE DECISION BELOW CONSTRUING FED.R.EVID. 608(b) CONFLICTS IN PRINCIPLE WITH DECISIONS FROM THE NINTH CIRCUIT COURT OF APPEALS AND THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS ON THE PROPER CONSTRUCTION OF THIS RULE UNDER SIMILAR CIRCUMSTANCES.

Because the above-cited reasons for granting this petition involve the same nucleus of fact and law, for purposes of brevity they will be argued together.

As previously noted, Petitioner testified in his own behalf. On direct examination, he denied committing the charged offenses. He made no blanket denials of involvement in other criminal or narcotics activity. On

cross-examination, the Government engineered Petitioner's denial of any drug related activity. Without questioning Petitioner further on the matter, the Government called a Dallas Police Officer who testified concerning an earlier "reverse" drug purchase operation in which Petitioner was a suspect. The trial court overruled Petitioner's objection to this testimony, holding that this was proper impeachment.

The Court of Appeals held that it was admissible under Rule 608(b): The Government was not impeaching Petitioner by extrinsic evidence of misconduct, but simply contradicting his denial of any drug activity. *United States v. Blake*, 941 F.2d 334, 338-339 (5th Cir. 1991).

By this holding, the Court of Appeals has misconstrued Rule 608 (b) and has apparently overruled an important principle under this Rule. Where a defendant is cross-examined for the purpose of impeaching his credibility by proof of specific acts of past misconduct not the subject of conviction, the examiner must be content with the witness's answer. The examiner may not, over objection, produce independent proof to show the falsity of the answer. Although the cross-examiner may continue to press the defendant for an admission, he cannot call other witnesses to prove the misconduct after the defendant's denial. *United States v. Cohen*, 631 F.2d 1223, 1226 (5th Cir. 1980); *United States v. Ling*, 581 F.2d 1118, 1120-1121 (4th Cir. 1978); *United States v. Whiting*, 311 F.2d 191, 196 (4th Cir. 1962) cert. denied, 372 U.S. 935 (1963).

As the dissent in this case argued, where the Defendant denies extraneous misconduct on cross-examination the Government may not produce independent proof to show the denial is false. In this situation, the defendant is being improperly impeached,

not contradicted.[1]

The Court of Appeals' gloss on Rule 608(b) is also contrary to cases from two other circuits. See *United States v. Bosley*, 615 F.2d 1274, 1276-1277 (9th Cir. 1980) (on cross-examination the defendant denied an extraneous drug delivery; admission of extrinsic evidence of this extraneous delivery was error under Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384, 1409 (n.8) (D.C. Cir. 1988) (where defendant in a criminal case takes the stand and on cross-examination denies charges of unrelated misconduct, the Government may not attempt to impeach his credibility with extrinsic evidence of such misconduct.

The opinion of the Court of Appeals has a severe impact upon the case law construing Rule 608(b). Besides the conflict in principle with the decisions from other Circuits, this opinion has an unfortunate and widespread effect. This opinion permits the Government new areas of cross-examination which previously were foreclosed. Under the majority opinion, the Government apparently may, in all cases where the accused testifies, engineer a denial of extraneous activity and proceed to introduce extrinsic evidence of extraneous offenses under the guise of "contradiction" regardless of whether this sort of impeachment is improper and whether the extrinsic evidence would in fact be admissible as an extraneous offense. For these reasons, Petitioner respectfully requests this Court to grant certiorari to review the holding of the Court of Appeals on this issue.

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1. Of course, had Petitioner denied involvement with any drug activity on direct examination, the Government could have contradicted him with extrinsic evidence without violating Rule 608(b). See *United States v. Cardenas*, 895 F.2d 1338, 1345-1346 (11th Cir. 1990); *United States v. Cousins*, 842 F.2d 1245, 1249 (11th Cir. 1988).

III.

THE COURT OF APPEALS IMPROPERLY HELD THAT EXTRINSIC OFFENSE EVIDENCE COULD PROPERLY HAVE BEEN ADMITTED UNDER FED.R.EVID. 404(b) WHEN THERE WERE NO FINDINGS BY THE TRIAL COURT ON WHETHER THIS EVIDENCE WOULD HAVE BEEN SUBSTANTIVELY ADMISSIBLE.

As an alternative ground for holding on the issues previously addressed, the Court of Appeals held that the extrinsic offense evidence introduced against Petitioner was also admissible under Fed.R.Evid. 404(b). The court held that, by his direct testimony and denials on cross-examination, Petitioner squarely placed at issue his knowledge and intent regarding narcotics trafficking. 941 F.2d at 339.

There are substantial reasons why a reviewing court should not review the admissibility of evidence under Rule 404(b). As was previously pointed out, the Government offered the extraneous conduct solely as impeachment and the trial court admitted it on that basis alone. The Government did not ask the trial court to admit the evidence as substantive proof of intent under Rule 404(b) and the trial court made no independent inquiry on this issue.

To admit extrinsic offense evidence under Rule 404(b), the trial court must determine whether the evidence is relevant to an issue other than the defendant's character and if the probative value of the evidence is not substantially outweighed by its prejudicial effect. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). The trial court must articulate its findings concerning this balancing test on the record if requested by a party. *United States v. Zabaneh*, 837 F.2d 1249, 1264 (5th Cir. 1988). Quite

simply, these are findings for the trial court, not the Court of Appeals, to make. If the trial court refused to admit extraneous offense evidence for substantive purposes, such was a matter of the court's discretion and admissibility of the evidence for substantive purposes cannot form the basis for affirmance on appeal. *United States v. Bosley*, 615 F.2d 1274, 1278 (9th Cir. 1980).

In also affirming on this ground, the Court of Appeals has clearly overstepped the limits of a reviewing court on appeal. The court has made fact findings which were not made by the trial court. Petitioner had no opportunity to be heard in the trial court concerning whether this evidence was substantively admissible. The Court of Appeals' alternative holding is not a fair exercise of its reviewing function and should be corrected by this Honorable Court.[2]

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2. Had this issue been submitted to the trial court, Petitioner would have been permitted to argue that he had not placed his intent in issue simply by denying involvement in the charged offense; therefore, the evidence was not relevant to intent under Rule 404(b). See *United States v. Colon*, 880 F.2d 650, 656-657 (2nd Cir. 1989), and cases therein cited. Moreover, Petitioner would have been permitted to argue that the Government had failed to prove that he was a participant in the alleged extraneous offense, especially given that Petitioner was standing some distance away from the narcotics transaction, and, according to the testimony of the arresting officer, out of earshot from the transaction the officer was conducting with another suspect.

IV.

THE COURT OF APPEALS IMPROPERLY HELD THAT THE GOVERNMENT'S CROSS-EXAMINATION SUGGESTING THAT PETITIONER HAD KILLED TEN PEOPLE IN JAMAICA WAS HARMLESS ERROR.

During trial, the Government was permitted, over objection, to ask the Petitioner if he had ever killed anybody and if he had ever told Government agents that he had killed ten people in Jamaica. The Court of Appeals properly concluded that admission of this evidence was error. However, the Court of Appeals improperly concluded that the evidence was harmless. The Court opined that Petitioner's testimony was inconsistent and it was contradicted on every substantial point by testimony of Government agents. According to the majority, a reasonable juror would have found, without the complained-of evidence, that Petitioner was not credible. The majority further asserted that the substantive evidence against Petitioner was overwhelming. 941 F.2d at 340-341.

Admission of this erroneous and inflammatory evidence severely impacted Petitioner's substantial right to be free from improper and unfairly prejudicial cross-examination. See Fed.R.Evid. 103(a).

In many respects, resolution of Petitioner's guilt or innocence depended upon whom the jury wished to believe - Petitioner or the Government agents. The Government did not link Petitioner through independent circumstantial evidence. Rather, the Government relied upon Petitioner's alleged statements to the agent admitting his criminal activity. Therefore, the evidence could be characterized as overwhelming only if one believed the officers over the Petitioner. Similarly, while

it is true that the agents who testified contradicted Petitioner, this is another credibility issue for the jury to resolve.

Therefore, to convict Petitioner for the most serious offenses alleged against him, the jury had to believe the case agents and disbelieve Petitioner. Given this all-important credibility determination, it simply cannot be said that the Government's unfair and inflammatory cross-examination was harmless error. It is only reasonable to assume that a jury would be much less likely to believe Petitioner if they had heard evidence suggesting that he was a multiple killer. The suggestion that Petitioner was an extremely dangerous person would also influence a jury to enter a verdict of guilty.

After due consideration of all the evidence at trial, without stripping the unfair and inflammatory from the whole, it cannot be said that the verdict was not substantially swayed by the error and it is similarly impossible to conclude that Petitioner's substantial rights were not affected. See *Kotteakos v. United States*, 328 U.S. 750, 760-765 (1946).

Petitioner would concede that the courts' holding on this issue has no widespread effect on the issue of jurisprudence of harmless error. Nevertheless, Petitioner received an extremely severe sentence under the Sentencing Guidelines. His conviction was based largely on credibility determinations by the trier of fact. This determination was tainted by extreme and inflammatory cross-examination. As a matter of justice, Petitioner's conviction should not be allowed to stand under these circumstances.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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COUNSEL OF RECORD

January 8, 1992

UNITED STATES of America,
Plaintiff-Appellee,

v.

Peter BLAKE, aka David Clark and Winston Wilson, Defendant-Appellant.

No. 90-1829

United States Court of Appeals,
Fifth Circuit.

August 28, 1991

CLARK, Chief Judge:

Peter Blake was convicted and sentenced under a seven-count indictment charging various weapons and narcotics offenses. He raises challenges to the indictment, to portions of the evidence admitted against him at trial, and to the sufficiency of the evidence on several counts. We affirm.

I.

In March 1989, Blake purchased two semiautomatic pistols from a dealer at a trade show in Dallas. He completed the transaction forms using the alias of Winston

Wilson.

In early April 1990, Dallas police officers observed Blake during a "reverse" drug transaction. An officer conducting undercover negotiations offered to sell two kilos of cocaine to Blake and another individual. Blake stood close by and observed the officer exchange the cocaine for $52,000.00. An arrest signal was given, and Blake's companion was apprehended. Blake escaped in a Nissan 300ZX. While not charged in the indictment, this drug sale was described to the jury in the government's rebuttal case.

Blake was arrested on April 12, 1990, after coming under police surveillance based on a warrant for his arrest regarding the firearms purchase under the alias of Winston Wilson. This surveillance culminated in a car chase, which ended in a wreck of the Nissan 300ZX in which Blake was a passenger.

At trial the government elicited testimony that, after his arrest, Blake spoke freely while in custody to law enforcement officers, confessing to a variety of criminal activities which included the conduct subsequently charged in the indictment. Blake denied these statements at trial,

along with any other knowledge of criminal trafficking in narcotics. Blake did sign consents to search the wrecked car and two apartments. Officers testified that he told them where the key to one of the apartments could be found. They also testified that he described a hiding place under a kitchen baseboard where he had stashed crack cocaine, a gun, and money, and informed them of a cache of weapons and ammunition in a pillowcase in the bedroom.

The officers found an automatic submachine gun, 161 grams of crack cocaine, and $6,000 in cash hidden behind the baseboard. A pillowcase in the bedroom contained four 9mm pistols and ammunition. The also discovered razors, plastic baggies, and a set of scales. In the car, the officers found two loaded guns, one in a bag under the passenger floorboard and the other in the driver's purse.

Blake was indicted on seven counts. Count 1 charged use of false identification in the acquisition of firearms, in violation of 18 U.S.C Sec. 922(a)(6) and 924 (a)(1). Counts 2 and 7 charged possession of firearms by an illegal alien, in violation of 18 U.S.C. Sec. 922(g)(5)

and 924(a)(2). Count 2 concerned Blake's purchase in March 1989 of the two semiautomatic pistols. Count 7 concerned the submachine gun and four 9mm pistols seized in the apartment after his arrest. Count 3 charged possession of cocaine with intent to distribute, in violation of 21 U.S.C. Sec. 841(a)(1). Count 4 charged unlawfully receiving and possessing an unregistered firearm -- the submachine gun hidden under the baseboard -- in violation of 26 U.S.C. Sec. 5861(d) and 5871. Counts 5 and 6 charged use of firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. Sec. 924(c)(1). Count 5 concerned the submachine gun found with the cocaine hidden under the baseboard. Count 6 concerned the four 9mm pistols found in the pillowcase in the bedroom.

A jury convicted him on all counts. The trial court imposed a total term of imprisonment of 50 years and 8 months. The district court also imposed a supervised release term of five years and made a special assessment of $350.00. Blake filed this timely appeal.

II.

Blake argues that the indictment improperly joined

two groups of offenses. He also raises several evidentiary issues from the district court's conduct of his trial. Finally, he challenges the sufficiency of the evidence against him on several of the counts.

A. *Joinder of Offenses*

Blake argues that the indictment charged two groups of offenses. Counts 1 and 2 concern his unlawful possession and acquisition of firearms in March 1989. The remaining counts all concern the events surrounding his arrest on April 12, 1990. The district court denied Blake's motion for severance of these two groups of offenses. Misjoinder is a question of law we review *de novo*. United States v. Park, 531 F.2d 754, 760 (5th Cir. 1976).

The district court did not err. Rule 8 of the Federal Rules of Criminal Procedure is broadly construed in favor of initial joinder. United States v. Scott, 659 F.2d 585, 589 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982). rule 8(a) allows joinder of offenses if the offenses charged "are of the same or similar character or are based on the same act of transaction or on two or more acts or transactions connected together or constituting parts of a

common scheme or plan." FED.R.CRIM.P. 8(a). Both groupings of offenses contain the identical charge of unlawful possession of firearms by an illegal alien. Joinder was permissible under Rule 8(a). Blake does not allege any prejudice -- much less substantial prejudice -- flowing from the district court's discretionary decision denying severance of these counts. See Scott, 659 F.2d at 589. Accordingly, the district court's ruling allowing these counts to proceed to trial under a single indictment was not error.

B. Evidentiary Issues

1. Extrinsic evidence of a prior act of misconduct

In its case-in-chief the government elicited testimony from three Dallas police officers that Blake had admitted involvement in the crimes charged and in other criminal activity. On direct and cross-examination, Blake denied making any incriminating statements to the police officers. On rebuttal, the government called a detective of the Dallas Police Department to testify, over Blake's objection, about Blake's presence at the "reverse" purchase operation

detailed in the facts above.

Blake contends this was improper impeachment, citing Rule 608(b) of the Federal Rules of Evidence. This rule provides:

> (b) Specific instances of conduct.-- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED.R.EVID. 608(b)

Under Rule 608(b) it is error to attack a witness' general character for truthfulness by using extrinsic evidence of his conduct that has not resulted in conviction of a crime. United States v. Cohen, 631 F.2d 1223, 1226 (5th Cir. 1980). We have, however, held that "Rule 608(b)

should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case." United States v. Opager, 589 F.2d 799, 803 (5th Cir. 1979).

Blake's admissions, in which he indicated that he had been extensively involved in drug trafficking, was a primary part of the government's case-in- chief. As such, the admission that he was in the drug business was clearly a material issue in the case. When Blake denied making the incriminating statements to the police officers on direct, he called into question the veracity of the officers' testimony about the confession. the government was entitled to present evidence about Blake's prior involvement with drugs to corroborate the testimony about Blake's confession. Evidence of other drug transactions corroborates Blake's admissions about drug trafficking. That Blake was a drug trafficker tends to show that the guns and cocaine found secreted in his girlfriend's apartment were part of his drug business. We follow the recent decision in United States v. Cardenas, 895 F.2d 1338, 1345-46 (11th Cir. 1990).

Under indistinguishable facts, that court stated:

> We do not believe that Rule 608(b) operates to exclude testimony such as this. Material relevant evidence, such as that presented by the government, which contradicts other material evidence does not tend to focus the jury's attention on an unrelated collateral matter, so as to confuse the jury and needlessly expend valuable time. Rather, such evidence aids the jury in determining whether a defendant actually and intentionally involved himself in the charged misconduct; its impeachment effect is merely ancillary.

Id. at 1346; see also United States v. Cousins, 842 F.2d 1245, 1248-50 (11th Cir.), cert. denied, 109 S.Ct 139 (1988). The Ninth Circuit has likewise concluded that "[i]ndividual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude." United States v. Batts, 558 F.2d 513, 517 (9th Cir. 1977), opinion withdrawn and aff'd on other grounds, 573 F.2d 599, cert. denied, 439 U.S. 859 (1978). [1] The evidence was admissible under Rule 608(b).

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[1]The original decision in Batts relied primarily on Rule

Furthermore, where the admission of evidence is proper on any ground, the district court's reliance on other grounds does not affect the defendant's substantial rights. Cardenas, 895 F.2d at 1345; Collins v. Seaboard Coastline Railroad Co., 681 F.2d 1333, 1335 (5th Cir. 1982). Rule 404(b) plainly provides an appropriate basis for admission. This rule generally bars evidence of other crimes, wrongs or acts to prove the character of a defendant and conduct in conformity therewith, unless it tends to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED.R.EVID. 404(b). Under this rule we have held that evidence of "other crimes" is admissible if it is relevant to an issue other than the defendants character, and the probative value of the evidence is not substantially outweighed by its prejudicial

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608(b), speaking only briefly to the support lent by Rule 404(b). This decision was subsequently withdrawn, and an opinion was substituted which rested exclusively on Rule 404(b). In Opager, this court quoted and adopted a large portion of the original Batts reasoning, Opager, 589 F.2d at 799, without noting the subsequent history. Having found the original Batts decision to be persuasive, we do not reconsider its language. In any event, the Batts decisions are complementary, and sustain affirmance here on either basis.

effect. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). By his direct testimony and denials on cross-examination, Blake squarely placed at issue his knowledge and intent regarding narcotics trafficking. "By admitting the rebuttal evidence, the trial court merely completed the picture as to appellant's true involvement and knowledge in the drug world and thereby corrected a distorted view of appellant's testimony." Batts, 558 F.2d at 518.

2. Impeachment

On cross-examination, Blake asserted that he had never possessed crack cocaine, that he never made any statements to the police regarding contraband they would find in the apartment and car, and that any testimony by the officers to the contrary was a lie. In the government's attempt to impeach this testimony by the officers to the contrary was a lie. In the government's attempt to impeach this testimony, the following colloquy took place:

> Q.Mr. Blake, have you ever killed anybody?
>
> MR. GLOVER:Your Honor, we would object to that as being highly --

THE COURT:I sustain that.

MR. WEBSTER: Your Honor, could we approach the bench?

THE COURT:Yes, sir.

(Bench conference on the record.)

MR. WEBSTER: Your Honor, this is part of the statement that we did not get into on direct examination with regard to him killing ten people, two of which were police officers in Jamaica.

THE COURT: Well, does he have a statement to you to the effect?

MR. WEBSTER: He has a statement to two agents to Agent Barber to that effect that we did not get into on cross-examination because we felt - -

THE COURT: You mean on direct?

MR. WEBSTER:Yes, sir, on good faith basis and all three of those individuals were willing to come up to this and state there were at least ten people in Jamaica were killed by Blake.

THE COURT: What about that?

MR. GLOVER: I assume he is going to deny it but that is pretty bizarre.

MR. WEBSTER: Bizarre is common place in this case.

MR. GLOVER: If he has denied that he did it he has denied all this other.

THE COURT: I understand. I think it is over doing it myself but I think the question is allowable.

MR. GLOVER: Okay.

THE COURT: I will take it on your representation that you have those statements to support it.

(End of bench conference on the record.)

THE COURT: Okay, Mr. Webster.

Q. (By Mr. Webster) Mr. Blake, did you ever kill anybody before you left Jamaica?

A. No, sir.

Q. At any time did you ever tell Agent Scott Pickett in the presence of Special Agent Blake Boteler or Investigator Terry Barber that you killed at least ten people in Jamaica?

A. No, sir.

No government witness was called to rebut this testimony. No further mention was made of this matter by

the government. During closing argument, Blake's counsel twice referred briefly to this line of questioning. He commented that the government's assertion that Blake made these statements was "ludicrous." He also pointed out the "prejudicial" nature of these statements, as well the unreliability stemming from the officers' decision not to videotape, to record, or to transcribe for signature these conversations.

Blake argues that the questions were entirely collateral to the substantive issues of the charged offenses, and that any probative value of this testimony on the issue of his credibility was substantially outweighed by the danger of unfair prejudice arising from the substantive implications of the questions. See FED.R.EVID. 403. The government responds that Blake's credibility was at issue, particularly regarding the scope of his conversations with those agents. See United States v. Contreras, 602 F.2d 1237, 1242 (5th Cir.), cert. denied, 444 U.S. 971 (1979).

Blake's credibility was placed at issue when he chose to testify. When testing that credibility, however, the government cannot simply set up *any* extraneous straw man

it wishes to knock down. Conceding, *arguendo*, that these questions were relevant to the issue of Blake's credibility, "a trial judge's analysis of admissibility only begins with the decision that proffered evidence is relevant. He must yet weigh its marginal contribution against potential prejudice and confusion, keeping in mind that the judge remains the jury's source of information regarding the law." United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984). On appeal, the Rule 403 balance to be struck by the district court will not be overturned absent an abuse of the trial judge's broad discretion this area. Id; United States v. Thevis, 665 F.2d 616, 634 (5th Cir.), cert. denied, 459 U.S. 825 (1982). Rule 403 is an "extraordinary measure" because it permits exclusion of relevant evidence. United States v. Caldwell, 820 F.2d 1395, 1404 (5th Cir. 1987). Thus, when reviewing the district court's exercise of discretion we view the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect. Id.

Admitting this evidence was error. The substance of the question was unfairly prejudicial: apart from the self-

generated credibility test, it was entirely unrelated to any substantive issue before the jury. From its agents' conversations with Blake and through its investigation, the government had obtained abundant evidence which it could use to impeach his credibility. The probative value of this cumulative impeachment was *de minimis*. Moreover, after asking the inflammatory question and receiving the anticipated negative response, the government chose not to call rebuttal witnesses to contradict this testimony. Neither did it attempt to argue this discrepancy in closing to emphasize Blake's lack of credibility. Instead, the prosecution threw the damning questions into the jury box without the follow-up it led the court to believe would be forthcoming from its agents. The "major function" of Rule 403 is "to exclud[e] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979). The government's conduct leaves the district court's ruling a clear abuse of discretion.

Finding error, however, the question then arises

whether this error was harmless. United States v. Rodriguez, 573 F.2d 330, 333 (5th Cir. 1978). "[W]hen an error is not of constitutional magnitude, it is not a ground for reversal if the error had no substantial influence and there was enough to support the result apart from the phase affected by the error." Id.

Blake's defense required the jury to determine whether he or the officers were lying. By admitting the following, Blake's own testimony assured the jury's determination that he was not a credible, reliable witness. He routinely used several aliases, supplying false names and other misinformation to enter the United States illegally and to obtain driver's licenses unlawfully. He asserted he and the female driver of the car were "casual friends." Yet he father he child, while professing to still love his wife and children he left in New York. He states that he never lived at the female's apartment, and that the contraband found there was not his. But, he admitted that the picture of his family found there was his. He explained this by testifying he had taken the picture to show his brother, who was visiting him from Jamaica but who had stayed at her

apartment. He also testified that he had no knowledge of guns, although he did admit to purchasing the two semiautomatic pistols for two men, one who name he did not know, and the other he knew only as "John." He testified that, when purchasing the weapons, he did not see the statement on the form which he signed regarding prosecution for false answers. He then testified on cross-examination that he thought it permissible to use a false name, to declare a false birthplace, and to deny being a illegal alien when making this purchase. He told the jury he did not even like guns, yet his leather jacket bore the name "Bullet." He then claimed this was not his nickname, and he did not know why or when it was stenciled on the back of his jacket. He explained the $1,000.00 in cash on his person when arrested by stating he had just been paid for finishing the body work on a car, although he could not remember who owned the car, the make of the car, or the location of where he had done the work. The gold chain with a Krugerrand medallion he was wearing when arrested was borrowed from a friend, but he did not know its value, nor did he identify the friend.

On every substantial point, Blake's testimony was contradicted by that of the officers. The description of the narcotics transaction presented by the government on rebuttal concluded with testimony of his escape in a Nissan 300ZX. The car in which he was a passenger when apprehended several days later was also a Nissan 300ZX. He claimed it was his first and only ride in the car. He testified that he saw only a plainclothes officer holding a gun and tapping on his window prior to the chase, but never saw or heard the uniformed officer in the squad car the officers testified was behind him flashing its lights and sounding its siren. The officers' testimony presented in the government's case-in-chief consistently recounted his statements that the contraband was his, along with his directions to the secret places in which it was concealed. All were proved to be accurate.

The record contains more of the same, but the above is more than sufficient to establish that any reasonable juror would have to conclude Blake was not credible. the substantive evidence against Blake was also overwhelming. The two erroneously admitted questions about killings were

prejudicial. But in the context of this trial, they clearly did not harm any substantial right of the defendant.

3. Irrelevant, prejudicial testimony

On rebuttal, Detective Hoskins testified: "I am a detective assigned to the Narcotics Division of the Organized Crime Drug Enforcement Task Force, Jamaican Task Force here in the Federal Building." Because he is Jamaican, Blake objected that this last reference was irrelevant and prejudicial. At bench conference, the district court agreed, and asked whether Blake's counsel wished an instruction to disregard. No such request was made. The government stated that it was surprised by this reference, which the witness voluntarily stated without prompting. Blake did not challenge this assertion. The district court concluded the matter by having counsel instruct the witness out of the jury's presence never to refer to Jamaica again.

Blake requested neither a curative instruction nor a mistrial. He argues here that his testimony was so prejudicial that he had no duty to make such a motion. He also urges that no instruction to disregard could have cured

the harm. We disagree. Even if considered inappropriate, Blake complains about the one work -- "Jamaican" -- spoken once in over two days of witness testimony. Without a request for a curative instruction or a mistrial, the appellate test if for plain error -- error that is "so fundamental as to have resulted in a miscarriage of justice." United States v. Yamin, 868 F.2d 130, 132 (5th Cir.), cert. denied, 492 U.S. 924 (1989). No plain error occurred here.

C. Sufficiency of the Evidence

Blake asserts that the evidence regarding counts 3, 5 and 6 is insufficient to support conviction. Count 3 charged possession of cocaine with intent to distribute. Counts 5 and 6 charged use of a firearm during and in relation to a drug trafficking offense. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in light most favorable to the government, with all reasonable inferences and credibility choices drawn in support of the jury's verdict. So long as a rational trier o fact could have found the essential elements of the crime beyond a reasonable doubt, the conviction will stand. United States

v. Cordova-Larios, 907 F.2d 40, 41 (5th Cir. 1990).

Count 3 required the government to prove that Blake (1) knowingly (2) possessed a controlled substance (3) with the intent to distribute it. United States v. Villasenor, 894 F.2d 1422, 1426 (5th Cir. 1990). Blake argues that the evidence was insufficient to link him to possession of the controlled substance, and that the amount was insufficient to raise an inference of intent to distribute. The jury heard testimony that Blake had confessed to ownership of the narcotics, directed agents to a keyring containing the key to the apartment, and disclosed the hidden compartment containing the narcotics. Other testimony established that the 161 grams of crack cocaine seized was a commercial quantity yielding approximately 2,000 individual doses. With the cocaine was found $6,000.00 in cash, razor blades, plastic baggies, and a set of scales. Taken together, the jury could reasonably infer that Blake committed the charged offense.

Blake argues that the weapons covered by counts 5 and 6 were never linked to him. Because the weapons were found with the narcotics, these weapons were sufficiently

linked to him by the same credibility assessments set out above.

Blake also argues that 18 U.S.C. Sec. 924(c)(1) requires that the weapons be used during and in relation to a drug trafficking crime He argues the government did no more than prove the proximity of a controlled substance and the named weapons. Blake recognizes that the government need not prove actual use or brandishing of the weapon. United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989). The government may meet its burden by showing that the weapon involved could have been used to protect, facilitate, or have the potential of facilitating the operation, and the presence of the weapon was in some way connected with the drug trafficking. United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988). In Robinson, we followed United States v. Matra, 841 F.2d 837 (8th Cir. 1988), which found it sufficient that "police had found loaded weapons, ammunition, a large quantity of cocaine and cash, and drug paraphernalia in a house *used* by [defendant] *and others*. Two of the weapons were found underneath sofa cushions, one underneath the bedcovers,

and another in the zipper bag of a vacuum cleaner." Robinson, 857 F.2d at 1010 (emphasis added). Blake's case is indistinguishable. The jury could find that Blake admitted to owning the weapons and narcotics and to having been in the apartment, and that he directed the police to the apartment key and tot he various weapons secreted adjacent to the narcotics. The evidence was more than sufficient to support conviction on counts 5 and 6.

III.

The judgment of the district court is

AFFIRMED.

GOLDBERG, Circuit Judge, dissenting:

Relying on a 2-1 decision by the Eleventh Circuit and a 2-1 decision by the Ninth Circuit which was subsequently withdrawn in relevant part, the majority holds that the government properly impeached the defendant's credibility with rebuttal evidence of his alleged participation in an unrelated, uncharged drug transaction. Because I am persuaded by the reasoning of the dissenting opinions in those two cases, and believe that other precedent prohibits the admission of extrinsic evidence on a collateral matter, I cannot join in Part II-B-1 of the majority opinion.

I.

I subscribe to the view that rule 608(b) means what it says: that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than the conviction of crime as provided in rule 609, may not be proved by extrinsic evidence Fed. R. Evid. 608(b) (emphasis added). The language of the rule is quite plain; extrinsic evidence is inadmissible when offered to impeach or bolster a witness'

credibility.

The majority correctly observes that we have held that "Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case." Majority op. at 6 (quoting United States v. Opager, 589 F.2d 799, 803 (5th Cir. 1979) (emphasis added). Under Opager's "specific contradiction" rule, a contradiction as to a material issue allows for the admission of extrinsic evidence, not for the purpose of impeaching the witness' testimony (i.e. undermining his credibility, but for the purpose of proving the truth of the contradicted, material fact. United States v. DiMatteo, 716 F.2d 1361, 1366 (11th Cir. 1983) (citing Opager), vacated on other grounds, 469 U.S. 1101 (1985). Of course, the contradiction of fact itself does not make the issue material; the issue is either fact itself does not make the issue material; the issue is either material or collateral, independent of the contradiction. As the D.C. Circuit has observed: "[t]he commonly used test of collaterality asks: 'Could the fact, as to which error is predicated, have been

shown in evidence for any purpose independently of the contradiction?'" United States v. Tarantino, 846 F.2d 1384, 1410 (D.C. Cir.) (quoting 3A Wigmore, Evidence Sec. 1103 (Chadbourn Rev. 1970)), cert. denied, 488 U.S. 840 (1988). Under this test, which I believe captures the essence of the materiality inquiry, Blake's participation in the unrelated, uncharged "reverse purchase" transaction was plainly a collateral matter.

Blake's defense at trial was that he did not reside in the apartment where the contraband was discovered -- that the apartment belonged to his ex-girlfriend, and that the contraband discovered there was not his. When he testified on direct- examination, Blake did not deny that he spoke with the police officers; he merely denied having confessed to owning the drugs and guns in his ex-girlfriend's apartment.[1] Although Blake stated on direct-examination

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[1]Blake's testified on direct- examination as follows:

A. ...[the police officers] started asking me about Sharon [Blake's ex-girlfriend].

Q. All right. Did they at that point indicate to you that she lived at O'Connor Ridge?

A. Yes, sir.

Q. Did you agree with that?

that he knew nothing about the contraband retrieved from the apartment, Blake did not deny his involvement with other drug activity; he offered no testimony on direct-examination regarding that issue. Only when Blake wa pressed on cross-examination whether he had participated in other drug activity did he deny his involvement.

The government, seizing on that denial, offered the rebuttal testimony to impeach Blake's testimony. The majority approves of this impeachment on the ground that:

> Blake's admissions [to the officers], in which he indicated that he had been extensively involved in drug trafficking, was a primary part of the government's case-in-chief. As such, the admission that he was in the drug business was clearly a material issue

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A. Yes, sir.

Q. Okay. They have indicated to the jury that you told them that you had dope in her apartment and that you had guns in her apartment an all of these various incriminating things and guns in the pillow case. Did you tell these agents anything about anything like that?

A. No, sir.

Q. All right. Did you know anything about anything like that?

A.No, sir.

Record, Vol. III at 33.

> in the case. When Blake denied making incriminating statements to the police officers on direct, he called into question the veracity of the officer's testimony about the confession. The government was entitled to present evidence about Blake's prior involvement with drugs to *corroborate the testimony about Blake's confession*. Evidence of other drug transactions corroborates Blake's admissions about drug trafficking.

Majority op. at 6 (emphasis added). the majority relies principally on the Eleventh Circuit's 2-1 decision in United States v. Cardenas, 895 F.2d 1338, 1345-46 (11th Cir. 1990) and the Ninth Circuit's original 2-1 decision in United States v. Batts, 558 F.2d 513, 517 (9th Cir. 1977), opinion withdrawn and substituted with, 573 F.2d 599, cert. denied, 439 U.S. 859 (1978).

I share the views of then-Judge (now Justice) Kennedy and Judge Young, as expressed in their dissenting opinions in Batts and Carenas, respectively, that the government may not rebut, with extrinsic evidence, a contradiction which is elicited on cross-examination. See Batts, 558 F.2d at 519-22 (Kennedy, J., dissenting) ("Since Batts did not testify on the subject of his prior conduct

during his direct examination (or voluntarily raise it on cross-examination), it was error to allow the ... cocaine into evidence.");[2] Cardenas, 895 F.2d at 1348 (Young, J., dissenting) ("In the instant case, the prosecution, not the defendant, injected into the case the issue of defendant's prior involvement with drugs.... Thus it cannot be said that [the defendant] 'made his true attitude toward illegal drugs a material issue' in this case."). To my view, the governmentmay not cross-examine a defendant about unrelated misconduct under threat of offering extrinsic evidence tending to prove that the defendant did in fact engage in that activity. As the D.C. Circuit has observed:

> where a defendant in a criminal case takes the stand and on cross-examination denies charges of unrelated misconduct, the government may not attempt to impeach his credibility with extrinsic evidence of such misconduct.

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[2]The Third Circuit has observed that then-Judge Kennedy's dissenting opinion in Batts apparently carried the day with the Ninth Circuit by virtue of its "subsequent modification of the opinion to eliminate all reliance upon rule 608(b) as a ground of admissibility." United States v. Herman, 589 F.2d 1191, 1197 (3d Cir. 1978) (holding that extrinsic evidence was inadmissible under rule 608(b)).

Tarantino, 846 F.2d at 1409 n.8.

I am not persuaded that by virtue of Blake's repudiation of his confession and denial of the charged offenses, he thereby made a material issue of his confession to, and participation in, the unrelated, uncharged transaction. The material issue in this case was whether Blake confessed to exercising dominion and control over the contraband seized from his ex- girlfriend's apartment, not whether he confessed to engaging in the reverse purchase transaction. I would agree that extrinsic evidence that Blake confessed to the charged crimes -- a witness testifying that Blake told him that he had confessed to the police officers -- would have been admissible, because that evidence would tend to contradict Blake's denial on the material issue of whether he confessed to the police officers -- would have been admissible, because that evidence would tend to contradict Blake's denial on the material issue of whether he confessed to the charged crimes. However, with respect to Blake's confession to participating in the unrelated, uncharged conduct, I would follow the Ninth Circuit's post-Batts decision and hold that, at most, "the government

could attempt on further cross- examination to elicit a response from [the defendant] contradicting his prior testimony, but it could not properly impeach [the defendant] through extrinsic evidence of [an unrelated drug transaction]." See United States v. Bosely, 615 F.2d 1274, 1276-77 (9th Cir. 1980) (extrinsic evidence inadmissible to contradict defendant's denial of participation in an unrelated drug transaction).

Thus, although I agree that "[w]hen Blake denied making the incriminating statements to the police officers on direct, he called into question the veracity of the officers' testimony about the confession," majority op. at 6, I do not believe that he thereby invited the government to introduce extrinsic evidence of all the conduct about which he allegedly confessed. Rule 608(b) and the specific contradiction rule cannot be given such elasticity.[3] Not every minute detail of a confession becomes material merely because the defendant disavows the confession.

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[3]Rule 608(b) specifically prohibits the introduction of extrinsic evidence to support credibility. Thus, the rebuttal testimony was not admissible to bolster the credibility of the police officers.

Blake's participation in the unrelated, uncharged drug transaction was collateral to the amterial issues at trial. The fact that Blake denied confessing to the crimes charged did not, *a fortiori*, make it any less so.[4]

II.

The majority holds, in the alternative, that the extrinsic evidence was admissible under rule 404(b) as evidence of Blake's intent and knowledge. The government did not offer the rebuttal evidence for that purpose, and the government did not argue on appeal that we should affirm on that basis. I therefore would decline to do so. See DeMatteo, 716 F.2d at 1367 ("we need not consider whether the evidence would be independently admissible, because the government, in accord with its understanding of the principle of specific contradiction, has never argued that

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[4]Even were this extrinsic evidence admissible for impeachment purposes, I question whether its probative value was sufficient to overcome the substantial risk of unfair prejudice it carried. See Fed.R.Evid. 403. As the majority acknowledges, "the government had obtained abundant evidence which it could use to impeach his credibility." Majority op. at 11. Thus like the "unfairly prejudicial" reference to the Jamaica murders, I would conclude that "[t]he probative value of this cumulative impeachment was *de minimus*." See id. at 11-12.

[the witness]' testimony was offered for any purpose other that to attack ... credibility").

Moreover, I entertain serious doubts as to the admissibility of 404(b) evidence in a case, like this one, where the sole issue at trial was whether the defendant committed the charged acts. Blake's defense at trial was not that he mistakenly or unknowingly possessed the contraband, but that he had no connection to the contraband at all. On this score, I would follow the lead of the Second Circuit and "recognize[] a distinction between defense theories that claim that the defendant did not do the charged at all, and those that claim that the defendant did the act mistakenly, with only the latter truly raising a disputed issue of intent." See United States v. Colon, 880 F.2d 650, 657 (2nd Cir. 1989) (reversing conviction and remanding for new trial on the ground that the 404(b) evidence was inadmissible). where knowledge and intent are not the central issues at trial, the proffered 404(b) evidence is not "particularly probative," cf. United States v. Gordon, 780 F.2d 1165, 1174 (5th Cir. 1986) ("Rule 404(b) evidence is particularly probative where the government has charged

conspiracy."), and its probative value is likely outweighed substantially "by its potential for unfair prejudice," see Huddleston v. United States, 108 S.Ct. 1496 1502 (1988) (acknowledging the potential for unfair prejudice attendant to admission of 404(b) evidence), especially when the risk of prejudice is not tempered by a limiting instruction. See United States v. Gonzalez-Lira, 936 F.2d 184, ___, No. 90- 2609, Slip op. 4896, 4905 (5th cir. July 9, 1991) (holding that the limiting instruction, "combined with the defense's ability to bring out the truth on cross-examination," insured that "the introduction of the evidence relating to the prior smuggling attempt would not lead the jury to convict [the defendant] for the prior crime").[5]

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[5]By affirming on this alternative ground, I fear that the majority trivializes the importance of the limiting instruction that must be given when the government seeks to admit 404(b) evidence and the defendant requests it. See Huddleston, 108 S.Ct. at 1502. In both Batts, 558 F.2d at 516, and Cardenas, 895 F.2d 1338, the jury was so instructed. Because the government offered the evidence not under rule 404(b), but specifically as impeachment evidence, there was discussion regarding a 404(b) limiting instruction, none was requested, and therefore none was given.

III.

Concluding, as I do, that the admission of the extrinsic rebuttal evidence was improper, I would reverse and remand for a new trial. I believe that the evidence of the uncharged drug transaction, especially in combination with the "inflammatory question" about whether Blake had killed someone, cannot be deemed harmless. As the majority acknowledges, "Blake's defense required the jury to determine whether he or the officers were lying" about his confession. See majority op. at 12. There was little, if any, evidence, other than the police officers' testimony of Blake's confession, proving that Blake possessed the guns and drugs in his ex-girlfriend's apartment. Blake's credibility was everything in this case. Although I too would agree that Blake's testimony was plagued with inconsistencies, from this remote vantage point, I cannot say with any degree of certainty that the erroneous admission of evidence establishing his participation in other drug activity, along with the "unfairly prejudicial" reference to the murder allegation, "had no substantial influence" on the jury in assessing his credibility and adjudging his

culpability. See id. (quoting United States v. Rodriguez, 573 F.2d 330, 333 (5th Cir. 1978)).

I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1829

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER BLAKE,
a/k/a David Clark and Winston Wilson,
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(October 10, 1991)

Before CLARK, Chief Judge, and GOLDBERG and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Chief Judge

(2)

No. 92-302

Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

PETER BLAKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether extrinsic evidence of petitioner's participation in a drug transaction should have been excluded under Rules 404(b) and 608(b), Fed. R. Evid.

2. Whether the prosecutor's cross-examination of petitioner about killings in Jamaica was harmless error.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-302

PETER BLAKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24, B1-B13)[1] is reported at 941 F.2d 334.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1991. A petition for rehearing was denied on October 10, 1991. Pet. App. C1. The petition for a writ of certiorari was filed on January 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The majority and dissenting opinions in the court of appeals are separately numbered in the appendix to the petition. For the convenience of the Court, we shall refer to the majority opinion as "Pet. App. A" and to the dissenting opinion as "Pet. App. B."

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of using false identification to acquire a firearm, in violation of 18 U.S.C. 922(a)(6) (Count 1); possessing firearms while an illegal alien, in violation of 18 U.S.C. 922(g)(5) (Counts 2 and 7); possessing more than 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3); possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 5 and 6). The district court sentenced him to a total of 608 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. A1-A24.

1. On March 25, 1989, petitioner purchased two firearms from a dealer at a trade show in Dallas, Texas. He completed the necessary firearms transaction forms using the false name "Winston Wilson." That purchase prompted a police investigation. On April 12, 1990, police officers arrested petitioner after a high speed automobile chase. While in custody after his arrest, petitioner spoke freely to police officers and confessed to numerous criminal offenses. Pet. App. A1-A2; Gov't C.A. Br. 3-4.

Among other things, petitioner told the officers his real name, admitted that he was an illegal alien, and said that he had lost $100,000 in a recent drug deal. Petitioner consented in writing to searches of the car involved in the chase and of two apartments. He also revealed the location of a key to one of the apartments, described the cache of weapons and ammunition he kept there, and disclosed a secret hiding place in the apartment where he had stashed cocaine base, a gun, and

money. Officers searched the apartment and found the weapons, ammunition, drugs, and money petitioner had described. Pet. App. A2-A3; Gov't C.A. Br. 4-5.

2. At trial, three police officers testified that petitioner had confessed to the conduct charged in the indictment and had told them about the apartment where the weapons, ammunition, drugs, and money were found. Pet. App. A6. Petitioner testified in his own defense. He denied telling the police about the apartment and, in response to the prosecutor's questions on cross-examination, he denied any involvement in drug trafficking. See *id.* at A8, A11. The prosecutor also asked petitioner whether he had ever killed anyone. Petitioner's counsel objected, and the district court held a bench conference at which the prosecutor represented that if the police were recalled, they would testify that petitioner had told them that he had murdered ten people in Jamaica. *Id.* at A11-A13. On the basis of that representation, the district court allowed the inquiry. Petitioner denied making the statement, and the government did not call any witnesses to rebut petitioner's denial. *Id.* at A13. See Gov't C.A. Br. 10-11. In its rebuttal case, the government introduced evidence that petitioner had been present at a drug transaction between an undercover officer and another individual, Kenneth Burke. Pet. App. A6.[2]

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[2] The evidence showed that in early April 1990, a Dallas police officer engaged in undercover negotiations to sell two kilograms of cocaine to two persons. The officer gave one of the persons, Kenneth Burke, cocaine in exchange for $52,000. Petitioner, the second person, was standing a few feet away at the time of the sale, watching the transaction. After the exchange, the police apprehended Burke, but petitioner escaped. Pet. App. A2; Gov't C.A. Br. 3.

3. A divided court of appeals affirmed petitioner's conviction. Pet. App. A1-A24. The court rejected petitioner's claim that Rules 404(b) and 608(b) of the Federal Rules of Evidence prohibited the prosecutor from introducing evidence of the Burke drug transaction in the government's rebuttal case. The court of appeals determined that the district court properly admitted the evidence, because it was relevant for a purpose other than demonstrating petitioner's character in order to show action in conformity therewith, Fed. R. Evid. 404(b), or attacking petitioner's general credibility, Fed. R. Evid. 608(b). As the court explained, the Burke transaction was relevant because petitioner was charged with using a firearm to facilitate drug transactions, he had admitted to the police officers that he was involved in drug trafficking, and his denial of drug trafficking at trial placed that matter at issue during the government's rebuttal. Pet. App. A6-A11.

The court also rejected petitioner's contention that the prosecutor's effort to impeach petitioner with two questions about killings in Jamaica required reversal of petitioner's conviction. Pet. App. A11-A20. The court found that although the questions were unfairly prejudicial and it was error to allow them, the error was harmless. *Id.* at A15-A20. The court determined that the evidence against petitioner was overwhelming, that no reasonable juror could have concluded that petitioner was a credible witness, and that the erroneously allowed questions did not affect any substantial right of petitioner's. *Id.* at A19-A20.[3]

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[3] The court of appeals also rejected petitioner's arguments that the district court erred when it did not sever certain counts of the indictment, that a mistrial should have been declared when a government witness stated that he worked for the "Jamaican Task

Judge Goldberg dissented. Pet. App. B1-B13. He concluded that petitioner's participation in the Burke transaction was collateral to the issues at trial and that petitioner's denial of involvement in drug trafficking, which the government elicited on cross-examination, did not convert petitioner's participation in the Burke transaction into a material issue. See *id.* at B3, B7, B9-B11. Judge Goldberg stated that he would have remanded the case for a new trial, because the erroneous admission of the extrinsic rebuttal evidence, coupled with the "inflammatory" questions about killings in Jamaica, "cannot be deemed harmless." *Id.* at B12.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the court of appeals erred in affirming the district court's admission of evidence that petitioner had participated in the Burke drug transaction. That evidence was relevant to the issues at trial, and neither Rule 404(b) nor Rule 608(b) prohibited its admission.

The Federal Rules of Evidence provide as a general matter that all relevant evidence is admissible. See Fed. R. Evid. 401-402. In this case, petitioner was charged with various offenses, including use of a firearm in relation to a drug trafficking crime. See 18 U.S.C. 924(c)(1). To prove that charge, the government called three police officers, who testified that petitioner had admitted involvement in drug trafficking and had directed the officers to an apartment where they found drugs, weapons, and money. Testifying in his own behalf, petitioner dis-

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Force" of the "Organized Crime Drug Enforcement Task Force," and that the evidence at trial was insufficient to support his conviction on three of the counts in the indictment. Pet. App. A5-A6, A20-A21, A21-A24.

puted the police officers' testimony and stated that he was not involved in drug trafficking. To rebut petitioner's testimony, the prosecutor properly introduced evidence of petitioner's involvement in the Burke drug transaction.

The evidence was relevant, because it had a tendency to make more probable a fact in issue at trial: whether petitioner was involved in drug trafficking. As the court of appeals explained, when petitioner denied an earlier admission to the police that he engaged in drug trafficking, he placed in issue the veracity of the officers' testimony about petitioner's admission. The government was entitled to present evidence showing petitioner's presence at the Burke drug transaction to corroborate the police officers' testimony and to establish petitioner's involvement in drug trafficking. Pet. App. A8. The government's evidence concerning the Burke drug transaction was particularly probative, because the evidence establishing petitioner's presence at that transaction was consistent with the police officers' testimony that petitioner had related losing a substantial amount of money in drug trafficking. See Gov't C.A. Br. 4.

Petitioner is mistaken in suggesting (Pet. 8-9) that Rule 404(b) prohibited the admission of evidence concerning the Burke drug transaction. Rule 404(b) forbids the use of extrinsic act evidence "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The Rule does not prohibit the use of extrinsic act evidence for other purposes. In this case, the prosecutor introduced evidence of petitioner's involvement in the Burke transaction for the proper purpose of corroborating prior testimony that petitioner disputed, and not to show that petitioner had a bad character and therefore probably

committed the charged crimes. See Pet. App. A10-A11; see also *United States* v. *Smith Grading & Paving, Inc.*, 760 F.2d 527, 531 (4th Cir.), cert. denied, 474 U.S. 1005 (1985).[4]

Petitioner is also mistaken in suggesting (Pet. 5-7) that Rule 608(b) prohibited admission of evidence showing petitioner's involvement in the Burke drug transaction. Rule 608(b) generally prohibits the use of evidence of specific instances of a witness's conduct "for the purpose of attacking or supporting the witness' credibility." Fed. R. Evid. 608(b). That prohibition, however, is limited to attacks on the witness's general "character" for veracity. See Fed. R. Evid. 608(b) Advisory Committee Note, 28 U.S.C. at 758. As the court of appeals explained:

> The application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's general character for truthfulness.

United States v. *Opager*, 589 F.2d 799, 801 (5th Cir. 1979). Rule 608(b) is "inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue. So long as otherwise competent, such evidence is admissible." 589 F.2d at 802. Thus, Rule 608(b) has no application here, where the government's extrinsic act evidence served as direct proof of a material fact at issue—petitioner's involvement in drug trafficking. Accord *United States* v.

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[4] Observing that the evidence was highly probative and corroborated matters already in evidence, the court of appeals correctly determined that Rule 403, Fed. R. Evid., would not provide a basis for excluding the evidence. Pet. App. A10-A11; see, *e.g.*, *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

Cardenas, 895 F.2d 1338, 1345-1346 (11th Cir. 1990) (evidence of prior drug activity by defendant admissible to contradict his testimony of noninvolvement with drugs).[5]

2. Petitioner contends (Pet. 10-11) that the prosecutor's inquiry whether petitioner had killed persons in Jamaica warranted reversal. The court of appeals properly concluded, however, that the prosecutor's inquiry was harmless error. Pet. App. A15-A20. As that court explained, the evidence of petitioner's guilt on the charged offenses was "overwhelming." *Id.* at A19. Petitioner had freely admitted his guilt to police officers in post-arrest statements, and he directed the officers to an apartment where they found incriminating evidence. See *id.* at A2-A3, A6, A19. To contradict the police officers' statements and the physical evidence, petitioner relied on his own testimony. As the court of appeals explained,

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[5] See also *United States* v. *Farias-Farias*, 925 F.2d 805, 809-810 (5th Cir. 1991); *United States* v. *Garcia*, 900 F.2d 571, 575 (2d Cir.), cert. denied, 111 S. Ct. 169 (1990); *United States* v. *Qaoud*, 777 F.2d 1105, 1112 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); see generally 3 D. Louisell & C. Mueller, *Federal Evidence* § 307 (1979 & Supp. 1992); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 608[05] (1992). Petitioner argues (Pet. 6-7) that extrinsic act evidence can never be used to impeach a defendant's statements on cross-examination, citing *United States* v. *Tarantino*, 846 F.2d 1384, 1409 n.8 (D.C. Cir.), cert. denied, 488 U.S. 867 (1988), and *United States* v. *Bosley*, 615 F.2d 1274, 1276-1277 (9th Cir. 1980). But even if those cases supported that dubious proposition, they would be of no aid to petitioner. The government was entitled to use evidence of petitioner's presence at the Burke drug transaction as direct proof of a material fact at issue—whether petitioner engaged in drug trafficking.

petitioner's own words thoroughly undermined his reliability as a witness. *Id.* at A17-A18.[6]

The court of appeals correctly concluded that no reasonable jury could have accepted petitioner's defense, that the objectionable questions did not affect the verdict, and that the prosecutor's improper inquiry accordingly was harmless error. See, *e.g.*, *United States* v. *Drummond*, 903 F.2d 1171, 1174 (8th Cir. 1990), cert. denied, 111 S. Ct. 759 (1991); *United States* v. *Neuroth*, 809 F.2d 339, 342 (6th Cir.), cert. denied, 482 U.S. 916 (1987); *United States* v. *Urbanik*, 801 F.2d 692, 698 (4th Cir. 1986); *United States* v. *Rodriguez*, 573 F.2d 330, 333 (5th Cir. 1978).

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[6] For example, petitioner admitted that he routinely used several aliases and employed false names and other misinformation to enter the United States illegally and to obtain driver's licenses unlawfully. He said that he had no knowledge of guns, but admitted that he had purchased two firearms on March 25, 1989. Petitioner claimed that when he bought the weapons he did not see the statement on the transaction form requiring truthful answers. He testified on cross-examination that, when purchasing a handgun, he thought he could permissibly use a false name, specify a false birthplace, and deny his status as an illegal alien. He said that he did not like guns and claimed that the name "Bullet," which was stenciled on his leather jacket, was not his nickname, yet he did not know either why or when the name was stenciled on his jacket. He explained his possession of $1,000 in cash at the time of his arrest as a payment he had received for finishing body work on a car, but he could not remember the owner of the car, its make, or where he had done the work. Pet. App. A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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